

Docket No.: 02-0160
Bench Date: 9/11/02
Deadline: N/A

MEMORANDUM

TO: The Commission

FROM: Leslie Haynes, Administrative Law Judge

DATE: September 6, 2002

SUBJECT: Z-Tel Communications, Inc.
-vs-
Illinois Bell Telephone Company, d/b/a Ameritech Illinois,

Verified Complaint and Request for Emergency Relief
Pursuant to Sections 13-514, 13-515 and 13-516 of the
Illinois Public Utilities Act.

Ameritech's Motion for Confirmation that Pursuant to the
Commission's May 8, 2002 Final Order The Emergency
Relief Granted in the Amendatory Order Entered On March
13, 2002 Expired on August 3, 2002

RECOMMENDATION: Grant Ameritech's Motion for Confirmation that in
Accordance with the Commission's Final Order, the
Emergency Relief granted to Z-Tel expired on August 3,
2002.

Z-Tel Communications, Inc. ("Z-Tel") filed its Verified Complaint and Request for Emergency Relief pursuant to Sections 13-514, 13-515 and 13-516 of the Public Utilities Act (the "Act") on February 21, 2002. In that Complaint, Z-Tel alleged that Illinois Bell Telephone Company, d/b/a Ameritech Illinois ("Ameritech") was violating Section 13-514 of the Act by failing to provide Z-Tel with accurate, timely and reliable line loss notifications. Pursuant to Section 13-515(e), Z-Tel requested the Commission enter emergency relief enjoining Ameritech from engaging in any Winback or direct marketing efforts to Z-Tel's residential or small business customers until such time as Ameritech provides identical Line Loss Notifications ("LLN") to Z-Tel as it provides to its own retail operations. The Commission granted a narrower form of emergency relief than that requested by Z-Tel on February 27, 2002 (clarified in its Amendatory Order entered on March 13, 2002). The Commission ruled that pending the final outcome of Z-Tel's Complaint, Ameritech would be precluded from using Line Loss Notifications to market Z-Tel's customers until 17 days after the date that a customer disconnects from Ameritech's service.

In its Final Order on May 8th, the Commission stated that:

We find it appropriate for the emergency relief to remain in place until such time as Ameritech's Winback marketing department relies solely on the 836 LLN and the defects in the 836 LLN system have been cured. (Ameritech Winback may use the enhanced LLN once Z-Tel has the option to receive a similar notice). Given that Ameritech has stated that the 836 LLN problems that are the subject of this Complaint will be resolved by May 3rd, the Commission requires that Ameritech file a report verifying that in fact the 836 LLNs are being provided in an accurate and timely manner. This report will be submitted to Staff for its review. If there is no filing by Staff that disputes Ameritech's report, within 30 days of Ameritech's filing, then the 17 day restriction, pursuant to the Commission's Amendatory Order granting emergency relief will be ended.

Final Order, pp. 24-25.

Ameritech, in its Motion for Confirmation that Pursuant to the Commission's May 8, 2002 Final Order the Emergency Relief Granted in the Amendatory order Entered on March 13, 2002 Expired on August 3, 2002 ("Motion"), now requests that the emergency relief be lifted.

Ameritech's Report

On July 3, 2002, pursuant to the Commission's direction, Ameritech filed its Verified Report to Staff. For purposes of its Report, Ameritech commissioned a special disconnect analysis study that evaluated every disconnect order processed for Z-Tel, WorldCom and Talk.com (although the latter two CLECs are not parties to the proceeding, they also make use of the 836 LLNs) for the period from June 3 through June 14. The Report included the following:

1. Since May 15, 2002, Ameritech's retail business units have relied exclusively upon the 836 LLN for their line loss information. Ameritech retail's receipt of the enhanced LLN ("Local Loss Report") was discontinued.
2. All identified issues with the 836 LLN process have been resolved or controlled as of June 3, 2002, and 836 LLNs are now being provided to Z-Tel and other CLECs at a level of timeliness and accuracy that exceeds applicable performance standards (currently set at 95%). Ameritech's study showed that timely and accurate LLNs were sent in over 97% of the instances.

3. Since June 17, 2002, the Local Loss Report has been made available to Z-Tel and other CLECs.

Ameritech also states that it is now providing CLECs a "Lines in Service Report". This report is provided at a CLEC's request and it provides a snapshot of the ACIS database that is taken as of the last billing date of the current month. The report is available to the CLEC in the middle of the following month. The Lines in Service Report indicates all active dial-tone based lines in service attributed to a CLEC account. There is no charge for this report.

Staff's Report

On August 2, 2002, Staff filed its Report in response to Ameritech's Report. In its Report, Staff acknowledges that Ameritech's retail operations now rely exclusively upon the 836 LLN. Staff also states that, with respect to whether the 836 LLN problems have been fixed, it is "reluctant to give Ameritech's assertions much weight" and "recommends that Ameritech continue to apply the emergency relief as ordered by the Commission in this proceeding until Ameritech demonstrates a sustained period of six months with no line loss notifications problems appearing." (Staff Report at 7).

Ameritech's Motion

Ameritech's Motion requests that the Commission confirm in accordance with its May 8th Final Order, the emergency relief expired on August 3, 2002, 30 days after Ameritech submitted its Report to Staff demonstrating its compliance with the requirements of the Commission's Order applicable to emergency relief.

Ameritech maintains that Staff does not dispute or even discuss the facts set forth in Ameritech's Report.

Ameritech also argues that Staff's recommendation is an improper rewriting of the Commission's Final Order. The Final Order did not require a six month waiting period and, Ameritech contends, if Staff had disagreed with that Order it should have requested a rehearing. The Commission cannot now change the requirements in the Final Order, Ameritech contends, without proper notice and hearings.

Moreover, Ameritech contends that a continuation of the emergency relief is inconsistent with the First Amendment. It argues that the public interest, which the Commission cited in its Final Order as a basis for the limitation on Ameritech's commercial speech, is "to promote effective and sustained competition in all telecommunications service markets." Ameritech asserts that the competitive field is now level, because it and the CLECs now both make use of the same 836 LLN for marketing purposes.

Staff's Response

In its Response to Ameritech's Motion, Staff contends that its Report disputes that submitted by Ameritech. Staff's position is 1) Ameritech's representation that it has cured the 836 LLN problems cannot be accepted because of prior and current evidence that 836 LLN problems exist notwithstanding alleged cures and 2) Ameritech's LLN problems should not be deemed cured until it can show a sustained period of six months, with no line loss notification problems appearing.

In support for its position, Staff claims that previous representations by Ameritech were later discovered to be inaccurate. Staff also cites a KPMG report from Michigan that indicates Ameritech is still experiencing problems with LLNs in that state.

Z-Tel's Response

Z-Tel argues that Ameritech's Motion is premature. Z-Tel states that the issues in Ameritech's Motion are currently on Rehearing and the Commission should therefore wait until that process is complete.

Further, Z-Tel maintains that Staff did dispute the finding in Ameritech's Report that the defects in the 836 LLN system had been cured and points out that Staff recommended that the emergency relief continue until Ameritech can show the 836 LLN problems have been solved for a period of six months.

Z-Tel also asserts that the Ameritech Report merely looked at timeliness, not at how accurate the 836 LLNs were.

Not relevant to the Ameritech's Motion or the emergency relief, Z-Tel also contends that Ameritech is not in compliance with other sections of the Commission's Final Order.

Ameritech's Reply

Ameritech's Reply addresses and explains the reasons for many of the problems that occurred in Michigan. Ameritech also contends that KPMG's Michigan test results do not in any way impeach the validity of accuracy of the data submitted by Ameritech in its Report. Ameritech also notes that if the Commission is going to consider KPMG results in other states, it needs to look at the closure of KPMG's test in Michigan which occurred on August 20, 2002 and the 100% scores that Ameritech has received in Indiana and Wisconsin.

Ameritech also disputes Z-Tel's claim that the Report only looked at LLNs that were sent and it contends that the study looked at all instances where a LLN should be sent, not just the timeliness of the notices that were sent. Moreover, Ameritech shared the results with Z-Tel, WorldCom and Talk.com and invited them to identify

inaccuracies, but these carriers did not identify a single LLN that contained inaccurate information. (Ameritech's Response at 10).

Finally, Ameritech contends that Staff's reference to prior evidence is not evidence of current problems and is not a valid reason for continuing emergency relief after those problems have been corrected.

ALJ's Analysis and Recommendation

The Commission's Final Order contained two requirements that Ameritech must meet in order to lift the emergency relief: 1) Ameritech Winback had to rely solely on the 836 LLN and 2) defects in the 836 LLN system had to be cured and LLNs were being supplied in an accurate and timely manner. No additional requirement must be met by Ameritech in order for the emergency relief to be lifted.

The Commission's May 8th Final Order did not require Ameritech to submit six months of data in its Report to Staff or require that the LLN issues must have been resolved for six months before emergency relief ended. Staff's recommendation that Ameritech demonstrate a sustained period of six months with no line loss notifications problems cannot be reconciled with the Commission's Order.

Staff's Report contains much information that is irrelevant to the decision of whether the emergency relief should remain in effect. Notably, however, Staff provided no evidence to dispute Ameritech's assertion that the LLN problems have been fixed. Staff is merely "reluctant to give Ameritech's assertions much weight." (Staff Report at 7).

In its Response to Ameritech's Motion, Staff cites to findings by KPMG in Michigan. KPMG's finding in Michigan are irrelevant. Staff and Z-Tel have presented no evidence that 836 LLN issues persist in Illinois. Staff, in its Report and in its Response to Ameritech's Motion, does not contest the truth or accuracy of the data submitted by Ameritech. Similarly, Z-Tel's Response does not raise one instance of 836 LLN problems.

Ameritech, in its Reply, correctly notes that if Z-Tel has evidence that Ameritech is not providing Z-Tel with timely and accurate LLNs, it should have provided that information to Staff during its review of Ameritech's Report or at least provided that evidence in its Response to Ameritech's Motion. (Ameritech's Reply at 16).

Z-Tel incorrectly opines that the issue of whether the errors in the 836 LLN process have been corrected is being considered in the rehearing. In fact, the Commission's grant of Rehearing does not involve, nor will Rehearing address the issue of whether Ameritech must correct the 836 LLN process. The only issue on rehearing is whether the 836 LLN and the Local Loss Report provide to CLECs the same information on disconnected customers as Ameritech retail and Winback operations receive. Thus, the directive of the Commission's Final Order remains unchanged and in effect.

Ameritech's Winback operation now exclusively relies upon the same 836 LLN process Z-Tel and other CLECs and is subject to the same shortcomings in that system when and if they occur. Because Ameritech is relying on the same 836 LLNs, there is now parity in the ability of parties to send Winback marketing material. Each company relies on the same notice. If there are problems, both experience them. With the emergency relief in place, however, Z-Tel can immediately send its marketing material and Ameritech must wait 17 days.

If Staff or Z-Tel believes that Ameritech has not complied with the Commission's Final Order, either party can, pursuant to 220 ILCS 5/13-516(d), petition a court of competent jurisdiction for an order at law or in equity requiring enforcement of the Commission order.

For these reasons, I recommend that the Commission grant Ameritech's Motion for Confirmation and find that in accordance with its final Order entered on May 3, 2002, the emergency relief granted to Z-Tel expired on August 3, 2002.

LH:jt